No. 91-1328

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Supreme Court of the United States

OCTOBER TERM, 1992

THE CITY OF CHICAGO, *et al.*,
Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF OF THE PETITIONERS

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SUPPLEMENTAL BRIEF OF THE PETITIONERS

This supplemental brief is submitted pursuant to Rule 15.7 of the Rules of this Court to respond to the Brief of the United States as Amicus Curiae, filed with the Court on October 19, 1992. The United States has suggested that this Court grant certiorari, vacate the judgment of the court of appeals, and remand this case to the Seventh Circuit for reconsideration in light of the memorandum issued by the Environmental Protection Agency ("EPA") on September 18, 1992. In that memorandum, EPA set forth its view that Section 3001(i) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6921(i), exempts the ash produced by the

combustion of municipal solid waste at resource recovery facilities from hazardous waste regulation under Subtitle C of RCRA (see *id.* §§ 6921-6939). We of course agree with EPA's substantive determination, but we oppose the suggestion that this case be remanded to the Seventh Circuit for reconsideration in light of the recent EPA memorandum. That court has already explicitly rejected the two premises of the United States' argument: that the statute is ambiguous and that deference to EPA's view is appropriate. In our view, remand will not change the result but will occasion significant delay, expense, and uncertainty. Plenary review should be granted now.

1. Seizing upon a single phrase in Section 3001(i) that neither party to this case, nor the Seventh Circuit, nor the Second Circuit in *Environmental Defense Fund v. Wheelabrator Technologies, Inc.*, 931 F.2d 211 (2d Cir.), *cert. denied*, 112 S.Ct. 453 (1991), considered to be relevant to the issue raised here, the United States asserts (Br. 7) that Section 3001(i) is ambiguous. The phrase the United States cites—a resource recovery facility "recovering energy from the mass burning of municipal solid waste"—does not in any way define the exemption granted by Section 3001(i). It merely describes the type of resource recovery facility that is covered by this section of RCRA. Only a resource recovery facility that is "recovering energy from the mass burning of municipal solid waste" is entitled to any exemption under Section 3001(i) from hazardous waste regulations. But the phrase says nothing about the scope of the exemption, which is the issue in this case. The phrase is therefore not only unambiguous, it is irrelevant to the issue dividing the parties and the courts of appeals. It is undisputed that the Northwest Facility is a resource recovery facility within the meaning of Section 3001(i). For this reason, even if the phrase the United States cites were ambiguous, its precise meaning would not be significant to resolving the issue raised in this case.

At any rate, the Seventh Circuit majority has already rejected the premise from which the United States begins. The majority held that the statutory language of Section 3001(i) is not ambiguous. It based its decision on what it believed was the meaning of the plain language of the statute. See Pet. App. 14a-16a. That language remains unchanged. On remand, the court is unlikely to change its opinion on the plain meaning of the statutory language in light of a recent memorandum from EPA.

2. The Seventh Circuit has also rejected the idea of deferring to EPA in this case. The majority reviewed the various statements EPA has issued regarding ash produced when municipal solid waste is burned at a resource recovery facility. Pet. App. 10a-12a. As the majority noted, the preamble to EPA's original household waste exclusion exempted ash from regulation as a hazardous waste. See 45 Fed. Reg. 33,120 (May 19, 1980) (codified as amended at 40 C.F.R. § 261.4(b)(1) (1987)). The EPA regulations issued after Section 3001(i) was adopted merely restated the language of Section 3001(i). See 40 C.F.R. § 262.4(b)(1). A preamble to the 1985 regulations, however, stated that "EPA does not see in this provision an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste." 50 Fed. Reg. 28,726 (July 15, 1985). In December 1987, EPA's Assistant Administrator for the Office of Solid Waste and Emergency Response testified before the Senate Subcommittee on Hazardous Waste and Toxic Substances of the Committee on Environment and Public Works. He stated that EPA had reexamined its 1985 interpretation of Section 3001(i), had concluded that it was in error, and that EPA believed that Congress had intended to exclude the ash from regulation under Subtitle C. Hearings on H.R. 2162, 16-17 (testimony of J. Winston Porter, Dec. 3, 1987). In May 1989, the Director of EPA's Office of Solid Waste testified before the same congressional hear-

ing, stating that EPA continued to follow its 1985 interpretation but believed that Section 3001(i) was ambiguous and needed clarification. *Id.* at 33 (testimony of Sylvia Lowrance, May 11, 1989).

After reviewing these various statements, the Seventh Circuit majority concluded that EPA's position was "waffling" and that "[t]he see-sawing statements from the EPA to which the district court gave 'little weight' deserve no weight at all." Pet. App. 33a. It is difficult to believe that yet another pronouncement from EPA would change the majority's view that EPA had spoken too many times already. Indeed, the latest memorandum may only confirm the majority's opinion that EPA's position is entitled to no weight because it continues to change.

The United States recognizes the proposition on which the Seventh Circuit majority relied. "'[T]he case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views.'" Br. 16 n.9 (quoting *Pauley v. BethEnergy Mines*, 111 S. Ct. 2524, 2535 (1991)). But the United States attempts to overcome the majority's rejection of EPA's views on the basis that "EPA has consistently recognized that Section 3001(i) is silent or ambiguous with respect to the issue presented here." Br. 17. Of course, EPA's puzzlement about what the statute means is precisely why the Seventh Circuit has already refused to credit its opinion.

3. Remand will occasion substantial costs and delay. The parties will be put to the expense of litigating once again in the Seventh Circuit and after that, litigating another petition for a writ of certiorari. In addition, under the Seventh Circuit's judgment, the City of Chicago faces the possibility of substantial fines—up to $25,000 per day, *see* 42 U.S.C. § 6928(g)—which may continue to run while the resolution of the issue in this case is delayed. Other local governments have expressed their concern about potential lawsuits and fines against them.

See Brief Amici Curiae of City of Ames, Iowa, et al. in Support of Petitioner 8-9. More important, a remand will delay the resolution of the conflict between the circuits on this important issue of federal environmental law and will, therefore, prolong the uncertainty that currently undermines the ability of resource recovery facilities throughout the country to plan and carry out their operations. See Brief of the National League of Cities and National Association of Counties as Amici Curiae in support of Petitioners 6-9; Brief of the City of Spokane, Washington, et al. as Amici Curiae in Support of Petitioners 11-13.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set down for argument.

Respectfully submitted,

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